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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT EDWARD CHAMBERS, JR.,

Defendant and Appellant.

F061139

(Madera Sup. Ct. No. MCR038327)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. W. Kent Levis, Judge. (Retired judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne L. LeMon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Robert Edward Chambers, Jr. (defendant) had not spoken to his mother, Lynette Chambers (Lynette), in nearly one year.[1] When they unexpectedly came into contact in Madera, Lynette decided to work on their relationship and asked defendant to repair her vehicle so she could sell it. She repeatedly told defendant that he could not use the vehicle unless she was present. After defendant repaired the vehicle, however, he drove away and failed to return for two days. During that period, he called Lynette, and she warned him that she was going to report the car as stolen if he failed to return within a few hours. Defendant never returned, and she reported defendant had stolen her car. An officer found defendant and the car a few hours later, and defendant claimed Lynette gave him permission to use the vehicle.

Defendant was charged with count I, unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a)); count II, receiving a stolen vehicle (Pen. Code,[2] § 496d, subd. (a)); and count III, misdemeanor driving on a suspended license (Veh. Code, § 14601.2, subd. (a)). As to counts I and II, it was alleged that defendant had served a prior prison term (§ 667.5, subd. (b)). The court later granted the prosecution's motion to dismiss count III.

After a jury trial, defendant was found not guilty of count I, taking and driving a vehicle; and guilty of count II, receiving a stolen car. The court found the prior prison term allegation true. He was sentenced to the midterm of two years plus one year for the prior prison term enhancement.

On appeal, defendant contends the court failed to properly instruct the jury on the intent element of count II, and that there is insufficient evidence to support his

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[1] Given the common last names, we refer to the victim by her first name for ease of reference; no disrespect is intended.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

conviction. He also contends defense counsel was prejudicially ineffective for referring to evidence which had been excluded, the prosecutor failed to disclose exculpatory evidence pursuant to *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), and the court improperly imposed a presentence report fee. We will affirm.

FACTS

Lynette lived in Madera for many years and then moved north to Orleans, California. Defendant was Lynette's adult son and remained in Madera. Lynette used to have a good relationship with defendant, but she testified their relationship had become "[t]ouch and go," "rough" and strained in recent years.

In June 2010, Lynette drove to Madera in her 1996 Ford Explorer to visit family and friends. On or about June 2, 2010, she drove to a house on Grant Street to see some friends. She knocked on the door and was surprised when defendant answered it. Lynette and defendant had not spoken in nearly one year, but she decided to be cordial and friendly with him, and work on their relationship.

Lynette testified that she told defendant about the mechanical problems she was having with her Ford Explorer. Defendant was a mechanic, and Lynette told defendant that she wanted to repair and detail the Ford so she could sell it. She told defendant she would pay him to fix the Ford and get it ready to sell. Lynette testified she never told defendant that he could take the car as payment for his repairs. She told defendant that he could not use the Ford unless she was also in the vehicle with him. Defendant installed a new water pump and performed a tune up on the Ford.

Defendant leaves with the vehicle

On June 3, 2010, Lynette and defendant drove together in the Ford to visit mutual friends who lived on Watson Road. They were invited to stay for a barbeque. Lynette went inside the house while defendant cleaned and detailed the Ford in the driveway.

At one point, defendant went into the house and asked Lynette if he could take the Ford to visit his girlfriend. Lynette repeatedly refused to give defendant permission to

take the Ford without her, and told him, "No, not without me with you because you don't know when to come back on time." Lynette testified that on previous occasions, she had given defendant permission to drive her vehicle. On this occasion, however, she was wary because defendant had previously borrowed her other vehicles and failed to return them on time.

Lynette testified she was inside the Watson Road house when she heard a vehicle drive away. She went outside and discovered that defendant had left in the Ford. Lynette asked their friends where defendant went, and she was told that defendant was test driving the vehicle. Lynette waited outside the house for several minutes and hoped defendant would return, but he never did. Lynette was concerned because the vehicle contained her suitcase, clothes, and her required daily medication.

When defendant failed to return to the Watson Road house, Lynette called his girlfriend, her niece, and other family friends, and asked if they had seen defendant. She told them that if defendant contacted them, they should tell defendant he needed to call Lynette because she wanted the Ford back. Defendant did not have a cell phone. Lynette testified that, without her vehicle, she had to spend the night with the friends at the Watson Road house, and she had to go to the hospital to get her required medication.

Lynette's testimony about the telephone calls

Lynette testified that at 2:00 a.m. on June 4, 2010, defendant called her at the Watson Road house. Defendant said he was with her niece, Julie. Lynette told defendant to bring back her car. Defendant replied, "I'm on my way now." However, defendant never returned.

Later on June 4, 2010, Lynette's friends drove her back to the Grant Street house. Lynette continued to call family and friends to leave messages for defendant, but she could not locate him.

Around 4:00 a.m. on June 5, 2010, defendant called Lynette at the Grant Street house. Defendant said he was just down the street, that he was going to stop at the store

to buy cigarettes, and then he would be right there. Lynette told defendant that she wanted her vehicle back. Lynette testified that she warned defendant that she would report the vehicle stolen if he did not return by daylight. Lynette stayed up to wait for defendant, but she fell asleep for several hours. When she woke up in the morning, she realized neither defendant nor the vehicle were there.

Lynette calls the police

On the afternoon of June 5, 2010, Lynette called the Madera Police Department and reported her Ford had been stolen, and defendant took it without permission. She did not receive any further calls from defendant. Lynette testified she waited two days until she contacted the police because defendant was her son and she loved him, and she tried to give him the benefit of a doubt.

Recovery of the vehicle

On June 5, 2010, California Highway Patrol Officer Brent Adams met with Lynette and took the report about her stolen Ford Explorer. He then drove around the area to look for the vehicle and defendant. About an hour and a half after taking the report, Officer Adams saw the vehicle on the road and realized the driver fit defendant's description. The vehicle was traveling in the opposite direction from where Lynette was staying at the Grant Street residence.

Officer Adams performed a traffic stop. Adams advised defendant he was driving a stolen car. Defendant said the vehicle was not stolen and that it belonged to Lynette, his mother. Defendant said he had talked to his mother about five minutes earlier, and he was in the process of returning the car to her. The vehicle was not damaged, and Lynette's personal property and medication were still inside.

Additional trial testimony

At trial, Lynette said she was only "partially" testifying voluntarily because "[n]o mother wants to go up against her child and put him away for any reason regardless of the situation." Lynette explained that when defendant was initially charged in this case,

she asked the prosecutor if there was any way to drop the charges, and she would have gotten out of the case if there had been a way for her to do so. She decided to testify because she needed to "stand my ground," and defendant needed to take responsibility for his actions and not take advantage of her.

DEFENSE EVIDENCE

It was stipulated that defendant had two prior felony convictions in 2001. He also had four prior convictions for crimes of moral turpitude, one of which was a felony that occurred in 2000, 2001, and 2010.

Defendant testified at trial that he was surprised when Lynette arrived at the Grant Street residence, because they had not seen each other for almost one year. Lynette asked defendant's advice about the Ford Explorer and said she wanted to sell it. Defendant repaired the vehicle for her.

Defendant testified that the next day, they drove to the Watson residence in the Ford Explorer, and stayed for a barbeque with their friends. Defendant worked on detailing and cleaning the vehicle, and then he had dinner with Lynette and their friends.

Defendant testified that around 8:00 p.m. or 9:00 p.m., he left the Watson residence in the Ford Explorer. Defendant told Lynette that he would be gone most of the night and into the next day because he was going to "try and scrape up some money so we'd be able to take better care of oursel[ves] …." Lynette told defendant that she did not want to "run around everywhere with me."

Defendant disputed Lynette's trial testimony. He testified that Lynette gave him permission to take the vehicle, and she said she would be comfortable to stay overnight with their friends at the Watson residence. Defendant testified that Lynette removed her medication and some clothes from the vehicle before he drove away from the Watson residence. Defendant testified that he had driven that Ford by himself on numerous occasions.

Defendant said he never called Lynette in the early morning hours of June 4, 2010. Instead, his girlfriend placed the call, and he was not present during the conversation. Defendant admitted he called Lynette around 4:00 a.m. on June 5, 2010. Lynette was "kind of upset" because he had been gone for so long. Defendant told her that he would be back shortly. Defendant again disputed Lynette's trial testimony, and testified Lynette never said he no longer had permission to drive the Ford, and she never threatened to report the vehicle as stolen if he failed to return it.

Defendant testified that after he talked with Lynette, he performed some errands, worked on other cars, made some money, and then fell asleep. Defendant claimed that when Officer Adams performed the traffic stop, he was on his way to perform one more errand, and then he planned to return the Ford.

Defendant testified he never intended to steal the Ford, and he never tried to sell it without Lynette's knowledge or permission. Defendant claimed that he and Lynette had already placed a "For Sale" sign in the Ford, which listed Lynette's name and telephone number. Defendant testified that a few people asked him about the sign, and defendant told them to call his mother on the number listed on the sign.

Defendant admitted that when Officer Adams performed the traffic stop, defendant said he had just talked to his mother five minutes earlier. Defendant testified he made that statement because he had asked a friend to call Lynette, but he did not know if the friend made the call. Defendant explained that he mistakenly said he had personally called Lynette because "I guess it was all the – with the gun in my face and everything."

DISCUSSION

I. Ineffective assistance; closing arguments about Lynette's excluded and stricken testimony

Defendant contends that both the prosecutor and defense counsel violated his due process rights when they used their closing arguments to discuss evidence which had

been excluded by the trial court, specifically as to whether defendant tried to sell the Ford. Defendant asserts defense counsel was prejudicially ineffective for initially referring to this evidence in his closing argument, and failing to object to the prosecutor's rebuttal argument when the prosecutor also referred to this evidence.

A. Trial evidence

During Lynette's trial testimony, she explained that she asked defendant to repair the Ford because she wanted to sell it. Lynette told defendant that she would pay him to fix the Ford and get it ready to sell. Lynette testified she never told defendant that he could take the car as payment for his repairs. She told defendant that he could not use the Ford unless she was also in the vehicle with him.

At a later point during Lynette's direct examination testimony, she explained that during defendant's last telephone call, she warned him that she was going to report that he had stolen the Ford unless he returned it by a certain time. She called the police when he failed to return.

> "[THE PROSECUTOR] And later that day did you eventually contact the police?
>
> "A Yes, I did. I was – I was getting really upset because I had gotten three phone calls within 30 minute time that my son was trying to sell my car."

Defense counsel immediately objected to Lynette's testimony about the telephone calls as hearsay and moved to strike the testimony. The prosecutor replied the evidence was being offered for Lynette's state of mind and not the truth of the matter. The court granted defense counsel's motion to strike Lynette's testimony about the calls.

During defendant's trial testimony, he testified that he never intended to take or sell the Ford when he drove away in it.

> "[DEFENSE COUNSEL] Okay. Were you going to sell the car?
>
> "A No, I never was.

"Q Okay. But you had talked about selling the car with your mom, though, right?

"A Me and my mom both had placed a for sale sign in the vehicle with her name and number. And I had gotten asked by a few people whether or not. I said, 'Well, if you want to talk to my mom, the number is in the window.'

"Q Okay.

"A That was it.

"Q But you weren't trying to sell the car without her knowledge, were you?

"A No, I was not."

There were no objections to defendant's testimony on this point.

B. <u>Closing arguments</u>

In his initial closing argument, the prosecutor did not discuss defendant's alleged attempts to sell the car. However, defense counsel raised the matter during his closing argument as he attempted to bolster defendant's credibility based on the trial evidence.

"Now, we heard testimony that – from both people that the car was going to be for sale. That's why they fixed it. That's why they cleaned it. They were detailing it and that there was actually a sign in the car that said this car is for sale and it has a phone number. Right? Mom's phone number.

"Now, we had heard testimony from [defendant] that he was actually offered by several folks to buy the car and he said, 'No, I can't sell my mom's car. You have to talk to her. Here's the phone number on the sign.

"*Mom testified she was getting calls. People wanted to buy. He was trying to sell her car. She's getting calls from people about buying the car*.

"Okay. If he wanted to keep that car or he wanted to steal that car or he didn't intend to take it back, he could have sold that car right out from under her, taken the money and run. But he didn't. He said, 'There is the number. Call her if you want to buy the car because it's her car.' " (Italics added.)

The prosecutor did not object to the italicized portion of defense counsel's closing argument when he referred to the section of Lynette's testimony, which the court had already stricken.

In the prosecutor's rebuttal, however, he responded to this portion of defense counsel's argument:

> "First of all, there was some discussion about the phone calls about the vehicle being for sale. *What [Lynette] told you was that she had heard from people who were calling her saying, 'He's trying to sell your vehicle.' She didn't get calls saying, 'I want to buy your vehicle*.' There was no testimony about that. Don't let the testimony become twisted or confused. She was hearing reports he was trying to sell it. It wasn't that people were calling to offer her money.
>
> "Defendant is trying to tell you that, oh, well, since he could have sold it and he didn't it means he didn't have this intent. He was trying to sell the vehicle. I don't know why he didn't sell it. Maybe they didn't offer enough money. We don't have testimony about that.
>
> "*But what the testimony was, was that she was getting calls hearing from people he was trying to sell that car*." (Italics added.)

The prosecutor further argued defendant's trial testimony was not credible because he was found driving in the opposite direction from Lynette's location when the officer performed the traffic stop, and he falsely claimed he had just spoken to Lynette and had her permission to use the vehicle.

Defense counsel did not object to the prosecutor's rebuttal argument, which referred to the stricken portion of Lynette's trial testimony.

C. <u>Analysis</u>

Defendant argues defense counsel was prejudicially ineffective for referring to stricken testimony in his closing argument, and failing to object to the prosecutor's references to the same stricken testimony in his rebuttal argument.

"To establish ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of

reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*In re Neely* (1993) 6 Cal.4th 901, 908-909.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence. [Citations.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 621-622.)

"An attorney may choose not to object for many reasons, and the failure to object rarely establishes incompetence of counsel. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) " '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings.…' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) Thus, "where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. [Citations.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

In the instant case, the jury heard admissible evidence that Lynette planned to repair and sell the Ford, there was a "For Sale" sign displayed in the vehicle, defendant allegedly received inquiries from people about buying the vehicle, and he told them to call the telephone number listed on the sign and speak to Lynette. However, the court granted defense counsel's motion to strike Lynette's testimony that she received calls from unidentified individuals who said defendant was trying to sell the Ford.

The record suggests that defense counsel might have made his brief reference to Lynette's stricken testimony based on some confusion as to whether the court had excluded the evidence, in light of defendant's testimony about the "For Sale" sign and that he deferred any inquiries about selling the Ford. Even though the court had granted defense counsel's hearsay objection to Lynette's testimony on this point, defense counsel attempted to use that testimony to defendant's advantage: he argued that the entirety of defendant's trial testimony was credible because Lynette received telephone calls about selling the truck, consistent with defendant's statements that various people asked him about the "For Sale" sign which Lynette and defendant had previously placed in the vehicle, and defendant told them to call Lynette's number listed on the sign. The record thus suggests a possible tactical reason that defense counsel briefly cited to stricken testimony, so that he could use Lynette's own testimony to bolster defendant's credibility.

The situation became murkier, however, when the prosecutor also referred to Lynette's stricken testimony. The record suggests that the prosecutor also may have been confused as to whether that evidence was stricken, and that he instead focused on trying to rebut defense counsel's reliance on that testimony to bolster defendant's credibility. Defense counsel did not object to the prosecutor's analysis of Lynette's stricken testimony, again implying that both the prosecutor and defense counsel may not have recalled that the court had stricken the evidence.

Defendant argues that defense counsel was prejudicially ineffective based on his references to Lynette's stricken testimony and his failure to object to the prosecutor's own discussion of that stricken evidence in rebuttal argument. "Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that, ' " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v.*

Anderson (2001) 25 Cal.4th 543, 569.) Defendant must show that counsel's errors were so serious as to deprive him of a fair result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

We cannot say it was reasonably probable that the result of the proceeding would have been different if these statements had not been made in closing argument. This case presented a stark credibility question between defendant and Lynette. Lynette insisted that she repeatedly told defendant he could not drive her Ford in her absence, he left the Watson house despite these warnings, her clothes and medication were in the vehicle when he drove away, she had to go to the hospital to get her required medication, she left telephone messages with family and friends that defendant had to return the Ford immediately, defendant called her twice and claimed he was on his way to her location, she warned him that she would report that he had stolen the Ford unless he returned by a certain time, and he still failed to return. In contrast, defendant insisted that Lynette gave her permission for him to leave the Watson house, she removed her medication and some clothing before he left, and she never revoked her permission for him to drive the Ford. Perhaps the most damaging evidence against defendant came from Officer Adams, who found defendant driving the Ford in the exact opposite direction from Lynette's location. Lynette's personal property and medication were still inside the vehicle. Defendant insisted he had Lynette's permission to drive the vehicle and he had just spoken to her within five minutes. At trial, however, defendant admitted that he had not spoken to Lynette and claimed he was upset because the officer had pulled him over.

While defense counsel should have refrained from discussing the stricken evidence, and objected to the prosecutor's similar references, counsel's errors were not prejudicial given the other facts in this case which severely undermined defendant's credibility.

II. Instructions on receiving a stolen vehicle

Defendant was charged and convicted of count II, receiving a stolen vehicle in violation of section 496d, subdivision (a). He contends the court failed to properly instruct the jury that in order to convict him of this charge, the jury had to find he intended to permanently deprive Lynette of the vehicle.

A. Section 496d

Section 496d, subdivision (a) states that a person commits the offense of receiving a stolen vehicle when that person "buys or receives any motor vehicle … that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor vehicle … from the owner, knowing the property to be so stolen or obtained …."

"To sustain a conviction for receiving stolen property, the prosecution must prove: (1) the property was stolen; (2) the defendant knew the property was stolen (hereafter the knowledge element); and, (3) the defendant had possession of the stolen property. [Citations.]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425 (*Russell*).) "Although receiving stolen property has been characterized as a general intent crime, the second element of the offense is knowledge that the property was stolen, which is a specific mental state." (*Ibid*.)

The jury in this case received CALCRIM No. 1750, as to the elements of receiving stolen property, a vehicle:

> "The defendant is charged in Count 2 with receiving stolen property in violation of Penal Code section 496d, sub (a).
>
> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> "No. 1, the defendant concealed or withheld from its owner property that had been stolen.

"And No. 2, when the defendant concealed or withheld the property, he knew that that the property had been stolen.

"Property is stolen if it is obtained by any type of theft, burglary, or robbery. Theft includes obtaining property by larceny, embezzlement, false pretense, or trick.

"To receive property means to take possession and control of it. Mere presence near or access to the property is not enough."

The jury received CALCRIM No. 1751, on the innocent intent defense to receiving stolen property:

"The defendant is not guilty of receiving stolen property *if he intended to return the property to its owner* when he concealed or withheld the property.

"If you have a reasonable doubt about whether the defendant intended to return the property to its owner when he concealed or withheld the property, you must find him not guilty of receiving stolen property.

"This defense does not apply if the defendant decided to return the property to its owner only after he wrongfully concealed or withheld the property. The defense also does not apply if the defendant intended to return the property to its owner when he concealed it or withheld it, but later decided to conceal or withhold the property." (Italics added.)

The jury also received CALCRIM No. 3406 on mistake of fact:

"The defendant is not guilty … if he did not have the intent required to commit the crime because he did not know a fact or mistakenly believed a fact.

"If the defendant's conduct would have been lawful under the facts as he believed them to be, he did not commit [the crime].

"If you find that the defendant believed that he had permission to take the vehicle or possess the vehicle for three days, he did not have the specific intent required for the crime[].

"If you have a reasonable doubt about whether the defendant had the specific intent required for the crime[], you must find him not guilty of [that crime]." (Italics added.)[3]

B. *MacArthur*

Defendant contends that while the jury received the above-described definitional instructions for receiving a stolen vehicle, and those instructions correctly defined the elements of the offense, the court had a sua sponte duty to further instruct the jury on the requisite intent for theft relevant to that offense.

Defendant's argument is based on *People v. MacArthur* (2006) 142 Cal.App.4th 275 (*MacArthur*), where the defendant was convicted of receiving stolen property after he pawned jewelry given to him by his girlfriend. The jewelry belonged to the girlfriend's mother. Both the defendant and his girlfriend testified she had taken and pawned the mother's jewelry on several prior occasions when she needed cash, that she always returned the jewelry after redeeming it, and that the mother knew about the transactions and never involved the police. The girlfriend testified her mother had never told her not to pawn the jewelry even though she knew about the prior instances. The defendant explained his girlfriend told him to pawn the jewelry for a small amount so it would be easy to redeem. The defendant testified he did not believe his girlfriend had stolen the jewelry, or that she had to get the mother's permission to take it. (*Id*. at pp. 277-279.)

In *MacArthur*, the trial court instructed the jury with a modified version of CALJIC No. 14.65, the predecessor to CALCRIM No. 1750, as to the elements of receiving stolen property. (*MacArthur*, *supra*, 142 Cal.App.4th at p. 280, fn. 3.) However, *MacArthur* reversed the defendant's conviction and held that instruction failed

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[3] "The court has a sua sponte duty to instruct on mistake of fact if the defendant relies on the defense or if there is substantial evidence that supports the defense and the defense is not inconsistent with the defendant's theory of the case. [Citations.]" (*Russell, supra*, 144 Cal.App.4th at p. 1427.)

to instruct the jury on the requisite intent for receiving stolen property, and the court had a sua sponte duty to instruct on the definition of theft. (*MacArthur*, *supra*, 142 Cal.App.4th at p. 280.)

> "For property to be 'stolen' or obtained by 'theft,' it must be taken with a specific intent. 'California courts have long held that theft by larceny requires the intent to *permanently* deprive the owner of possession of the property.' [Citation.] An intent to *temporarily* deprive the owner of possession may suffice when the defendant intends 'to take the property for so extended a period as to deprive the owner of a major portion of its value or enjoyment....' [Citation.] [T]aking a diamond ring for two weeks is one thing; taking fresh strawberries for two weeks is another. [Citation.] [¶] Thus, to find defendant guilty of receiving stolen property, the jury needed to determine whether the jewelry had been taken with the intent to deprive the girlfriend's mother of possession for a sufficiently extended period. [Citation.]" (*MacArthur*, *supra*, 142 Cal.App.4th at p. 280, italics in original.)

MacArthur cited the trial testimony of the defendant and his girlfriend and held that since the trial evidence "called into question whether any relevant participant had the requisite intent," the court should have instructed the jury sua sponte with definition of " 'stolen' and 'theft.' " (*MacArthur*, *supra*, 142 Cal.App.4th at p. 280.) *MacArthur* further held the court's failure to "instruct the jury that theft requires a particular intent" left the jury with no basis to determine "whether the jewelry had been stolen – an issue raised by the evidence. The jury's only guidance as to what constitutes stolen property came from the prosecutor, who wrongly defined the term without any reference to intent. We cannot say beyond a reasonable doubt that the inadequate instructions did not contribute to defendant's conviction. [Citations.]" (*Id.* at pp. 280-281.)

As a result of the decision in *MacArthur*, the Bench Notes for CALCRIM No. 1750 state in part:

> "If there are factual issues regarding whether the received stolen property was taken with the intent to permanently deprive the owner of possession, the court has a **sua sponte** duty to instruct on the complete definitions of

theft. *People v. MacArthur* [, *supra*,] 142 Cal.App.4th 275 [47 Cal.Rptr.3d 736]." (Bold in original.)

MacArthur thus held that if supported by the evidence, the jury must be instructed that at the time of the taking, the defendant must have the specific intent to permanently deprive the owner of the property, or deprive an owner temporarily but for an unreasonable time of a major portion of its value or enjoyment. (*People v. Avery* (2002) 27 Cal.4th 49, 54 (*Avery*); *MacArthur*, *supra*, 142 Cal.App.4th at p. 280; *In re Jesus O.* (2007) 40 Cal.4th 859, 867; *People v. Parson* (2008) 44 Cal.4th 332, 353.) An intent to temporarily deprive the owner of possession may suffice when the defendant intends to take the property for so extended a period as to deprive the owner of a major portion of its value or enjoyment. (*Avery, supra,* 27 Cal.4th at p. 54; *MacArthur, supra*, 142 Cal.App.4th 275, 280.) " '[O]ne must intend to deprive the owner of the possession of his property either permanently or for an unreasonable length of time, or intend to use it in such a way that the owner will probably be thus deprived of his property.' [Citation.] 'An intent to return the property taken, in order to qualify as a defense to larceny, must be an intent to return within a reasonable time.' " (*Avery, supra,* 27 Cal.4th at p. 56.)

C. <u>Analysis</u>

As applied to this case, defendant argues the court should have instructed the jury as to the requisite intent to permanently deprive, as required by *MacArthur*, based on his trial testimony that he never intended to steal the Ford, that he had driven the vehicle by himself on prior occasions, and that Lynette gave him permission to take the Ford during this incident. Defendant argues the court's failure to sua sponte instruct on these points requires reversal of his conviction.

Respondent concedes that the jury herein did not receive the instructions suggested by *MacArthur*. However, respondent urges this court to find that *MacArthur* was wrongly decided. We decline to do so and instead conclude that the court's failure to instruct pursuant to *MacArthur* is necessarily harmless in this case because the factual

question posed by the omitted instructions was resolved adversely to defendant under other, properly given instructions. (*People v. Pulido* (1997) 15 Cal.4th 713, 726; *People v. Kobrin* (1995) 11 Cal.4th 416, 428, fn. 8; *People v. Sojka* (2011) 196 Cal.App.4th 733, 738.)

In *MacArthur*, the jury only received the definitional instruction for receiving, consistent with the predecessor instruction to CALCRIM No. 1750. In this case, however, the jury was also instructed with CALCRIM No. 1751, innocent intent as a defense, and CALCRIM No. 3406, on mistake of fact. These instructions directly addressed defendant's trial defense – that Lynette gave him permission to drive away in the Ford, and he did not intend to permanently or temporarily deprive Lynette of the vehicle as defined in *MacArthur*. CALJIC No. 1751 instructed the jury that defendant was not guilty of receiving "*if he intended to return the property to its owner* when he concealed or withheld the property." (Italics added.) CALCRIM No. 3406 further defined mistake of fact that defendant was not guilty if the jury found "*the defendant believed that he had permission to take the vehicle or possess the vehicle for three days."* (Italics added.) If the jury believed defendant's trial testimony – that he never intended to permanently or temporarily deprive Lynette of the vehicle, and she gave her permission for him to drive it away – it would have been compelled to find him not guilty based on these instructions. The jury obviously resolved these issues against defendant based on the guilty verdict for count II, receiving a stolen vehicle. Thus, any instructional error was necessarily resolved against defendant in this case.

III. <u>Substantial evidence of count II</u>

Defendant next contends his conviction in count II for receiving a stolen vehicle must be reversed because there is insufficient evidence that he intended to permanently deprive Lynette of the vehicle.

When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to

determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies when the conviction rests primarily on circumstantial evidence. (*Ibid.*) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 496, subdivision (a) deals with the crime of receiving stolen property, and there are a host of cases that analyze and seek to construe that particular subdivision. In common parlance, "receiving stolen property" connotes that property has been stolen; the accused received, concealed or withheld it from its owner; and that the accused knew the property was stolen. (*People v. Stuart* (1969) 272 Cal.App.2d 653, 656.) Accordingly, the long-standing common law rule held that a person could not be convicted of both stealing and receiving the same property, because "a thief cannot receive from himself …. [Citation.]" (*People v. Allen* (1999) 21 Cal.4th 846, 850, 854 & fn. 4 (*Allen*).) As the California Supreme Court explained: "The statute proscribing receipt of stolen property '... is directed at those who knowingly deal with thieves and with their stolen goods after the theft has been committed. In other words, it is directed at the traditional "fence" and at those who lurk in the background of criminal ways in order to provide the thieves with a market or depository for their loot. Such offenses are essentially different from the actual theft of property …. If the legislature had intended in [section 496] to embrace concealment of stolen property by the thief, it would have been

a simple matter to say 'every thief or any other person ... who conceals, etc." ' [Citation.]" (*People v. Jaramillo* (1976) 16 Cal.3d 752, 758.)

In 1992, section 496, subdivision (a) was amended (Stats. 1992, ch. 1146, § 1) to add the following language: "*A principal in the actual theft of the property may be convicted pursuant to this section*. However, no person may be convicted both pursuant to this section and of the theft of the same property." (Italics added.) Thus, conflicting views of whether one may be both the thief and the recipient of stolen property are now statutorily addressed. (*Allen, supra*, 21 Cal.4th at pp. 857-858.)

In this case, defendant was convicted in count II of receiving a stolen vehicle in violation of section 496d, subdivision (a).[4] As explained *ante*, "[t]o sustain a conviction for receiving stolen property, the prosecution must prove: (1) the property was stolen; (2) the defendant knew the property was stolen (hereafter the knowledge element); and, (3)

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[4] Section 496d was enacted in 1998 (Stats. 1998, c. 710 (A.B. 2390)), to prohibit unlawfully receiving certain specified motor vehicles, trailers and vessels, as distinguished from section 496, subdivision (a)'s more general prohibitions. The legislative intent for its enactment was related to enhanced penalties and tracking crimes involving motor vehicles. However, the provision that resolved the issue of whether one could be both the principal thief and recipient of stolen property was not included in section 496d.

"[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. [P]rovisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] … An interpretation that renders related provisions nugatory must be avoided [citation] …." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *People v. Reyes* (1997) 52 Cal.App.4th 975, 987.) Defendant was found not guilty of count I, unlawfully taking or driving a vehicle, but guilty of count II, receiving a stolen vehicle in violation of section 496d. Defendant has not raised the issue of the distinction between the analysis and application of section 496, subdivision (a) and section 496d, and we will not address the issue further.

the defendant had possession of the stolen property. [Citations.]" (*Russell, supra,* 144 Cal.App.4th 1415, 1425.) Defendant must have the specific intent to permanently deprive the owner of the property, or deprive an owner temporarily but for an unreasonable time of a major portion of its value or enjoyment. (*Avery, supra,* 27 Cal.4th at p. 54; *MacArthur, supra,* 142 Cal.App.4th at p. 280; *In re Jesus O., supra,* 40 Cal.4th at p. 867; *People v. Parson, supra,* 44 Cal.4th at p. 353.)

Defendant's conviction is clearly supported by substantial evidence. Lynette testified that she repeatedly told defendant that he could not drive the Ford unless she was present. When he asked to leave the Watson house in the Ford, Lynette told him no. Nevertheless, defendant drove away, he left while Lynette's clothes and medication were still in the vehicle, and he failed to return for two days. Lynette testified that she spoke to defendant twice by telephone during this period and ordered him to immediately return her vehicle. Each time defendant promised to return with the vehicle, and each time he failed to do so. During their last conversation, Lynette told defendant that she would report the vehicle was stolen if he failed to return by daylight. Defendant again failed to return. When he was apprehended by Officer Adams, defendant was driving in the opposite direction from Lynette's location, and falsely claimed he had just spoken to her and she had given her permission to use the vehicle. Defendant refuted Lynette's trial testimony on these points, and even claimed that he left Lynette with her clothing and her medication before he drove away in the Ford. Nevertheless, the jury obviously rejected his credibility, and Lynette's description of defendant's statements and conduct raised the inference that he had the requisite specific intent when he drove away in the Ford and refused to return, even when Lynette threatened to call the police. Defendant's conviction is supported by substantial evidence.

IV. Alleged *Brady* error

Defendant next contends the prosecutor violated his due process rights pursuant to *Brady* by failing to disclose exculpatory evidence to the defense – that Lynette had a

prior felony conviction for possession of narcotics for sale, which could have been used to impeach her credibility. As we will explain, however, the prosecution's failure to disclosure this information was not prejudicial because defendant was well aware of Lynette's prior conviction.

A. Defendant disclosed Lynette's prior conviction to defense counsel

On August 10 and 11, 2010, defendant's jury trial was held. On the morning of August 11, 2010, the attorneys gave their closing arguments, and the jury was instructed. Later on the morning of August 11, 2010, the jury began the deliberations. On the afternoon of August 11, 2010, the court reconvened and advised the parties that the jury had reached a verdict.

At that point, outside the jury's presence and before the verdicts were read, defense counsel advised the court that defendant had informed him that Lynette may have a prior felony conviction for the sale of controlled substances. Defense counsel said defendant gave this information to him after counsel completed his closing argument. Defense counsel acknowledged he did not make a formal or informal discovery request as to Lynette's criminal history, but argued the prosecutor was required to disclose favorable information to the defense even in the absence of a request.

The prosecutor said he did not know if Lynette had any convictions because her "rap sheet was never run" or requested by the district attorney's office. The court acknowledged the issued being raised and proceeded with the reading of the verdicts.

B. Defendant's initial new trial motion

On September 14, 2010, the court convened for the scheduled sentencing hearing. Defense counsel asked to continue the matter because he was going to make a motion for new trial.

The prosecutor advised the court that he determined Lynette had a prior conviction on October 20, 1994, for violating Health and Safety Code section 11378, possession of narcotics for sale; she was placed on probation; it was an offense of moral turpitude; her

trial testimony could have been impeached with that prior conviction; and defense counsel never requested Lynette's records. The prosecutor asked defense counsel if he would stipulate to those facts. Defense counsel stipulated and clarified that defendant's new trial motion was going to be based on alleged *Brady* error based on the prosecutor's failure to disclose Lynette's prior conviction.

The prosecutor argued that even if Lynette's prior 1994 conviction had been disclosed before trial, the People would have moved to exclude it pursuant to Evidence Code section 352, and prevent defendant from impeaching her trial testimony because it occurred 16 years before the events in this case, and Lynette did not have any other convictions after that time. The court continued the sentencing hearing and advised the parties to file their pleadings on the issue.

C. Defendant's new trial motion

On September 17, 2010, defendant filed a motion for new trial based on the prosecution's alleged failure to disclose Lynette's prior conviction. The motion asserted that defendant advised his defense attorney about Lynette's prior conviction after the close of evidence. Defendant attached exhibits to the motion, which indicated that Lynette was convicted of possession for sale in 1994 and placed on probation, that she repeatedly violated probation, numerous petitions for revocation were filed against her, and that she was not discharged from probation until 2006. Defendant argued the entire case depended on the jury's credibility determinations, defendant's own credibility was impeached with his prior convictions of moral turpitude, and the prosecution's failure to disclose Lynette's prior conviction of moral turpitude was prejudicial because her trial testimony and credibility were never impeached.

On September 23, 2010, the prosecution filed its opposition. While the prosecution conceded it inadvertently did not discover exculpatory information since it never investigated Lynette's criminal record, it argued the error was not prejudicial. The

prosecutor argued Lynette's prior conviction from 1994 would not have been admissible to impeach her trial testimony because it occurred 16 years before the trial in this case.

D. Hearing on the new trial motion

On October 1, 2010, the court held the hearing on defendant's new trial motion. The court heard brief arguments and then denied defendant's motion:

> "No. 1, I believe that [defense counsel] did not know and, therefore, you were not able to cross-examine [Lynette]. However, [defendant] certainly knew. That's how you found out after she testified, the witness testified. You found out because your client knew. And I believe that the knowledge of the client is and should be imputed to counsel.
>
> "Second, I think that the gravamen of the trial and the evidence at trial as I recall it was the knowledge of that witness [Lynette] with regard to whether or not the defendant was going to take her car and that that issue was decided in favor of the defendant. He was acquitted of the grand theft auto.
>
> "It was very clear from the evidence, and I don't think that the evidence was disputed, that he had kept the vehicle in his possession for some period of time. And I think that the jury quite rightly found that that was – the extended period of time was the gravamen of receiving stolen property defense for which he was convicted.
>
> "I don't believe that the conviction of a charge of possession for sale of methamphetamine 16 years ago, in spite of violations of probation and extensions of probation, would be such that it would materially affect the outcome of the case had the jury been advised of that. There is no evidence as to the violations of probation that there were any new offenses. It appears that the violations simply were for not reporting, not coming to court as [she] should have."

E. Analysis

Defendant contends the prosecution violated *Brady* by failing to investigate and disclose that Lynette had a prior conviction for possession of narcotics for sale, an offense of moral turpitude that could have been used to impeach her trial testimony.

"A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. [Citation.]" (*Youngblood v. West Virginia* (2006)

547 U.S. 867, 869.) " 'The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.' [Citations.] The *Brady* duty extends to evidence that is both favorable to the accused and material either to guilt or to punishment [citations], and to impeachment evidence as well as to exculpatory evidence [citations]. Because 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police' [citation], '*Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor" ' [citations]. Moreover, the duty to disclose exists regardless of whether there has been a request by the accused, and the suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent. [Citations.]" (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1225.) The duty of disclosure exists regardless of good or bad faith. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132, reversed on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Although *Brady* disclosure issues may arise prior to, during, or after trial, the test is always the same. (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51; *People v. Jordan* (2003) 108 Cal.App.4th 349, 359.) "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) A claim of *Brady* error is subject to independent review. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

However, " 'where the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense.' [Citations.]" (*Raley v. Ylst* (9th Cir. 2006) 470 F.3d 792, 804 (*Raley*).) "Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence. [Citations.] Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it ' "by the exercise of reasonable diligence." ' [Citations.]" (*People v. Salazar, supra*, 35 Cal.4th at pp. 1048-1049.)

"Consequently, 'when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim.' [Citations.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 715.) "Evidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence." (*United States v. Stuart* (8th Cir. 1998) 150 F.3d 935, 937.)

In *Raley*, for example, the court rejected the defendant's argument that the prosecution committed a *Brady* error by failing to disclose alleged exculpatory and mitigating evidence contained in his medical records while he was confined in jail. "[The defendant] possessed the salient facts regarding the existence of the records that he claims were withheld. [The defendant] knew that he had made frequent visits to medical personnel at the jail. He knew that he was taking medication that they prescribed for him. Those facts were sufficient to alert defense counsel to the probability that the jail had created medical records relating to [the defendant]. Because [the defendant] knew of the

existence of the evidence, his counsel could have sought the documents through discovery. [Citation.]" (*Raley*, *supra*, 470 F.3d at p. 804.)

As applied to the instant case, defendant asserts that potential impeachment evidence against Lynette would have been favorable to his case, within the meaning of *Brady*. As noted by the People, however, defendant's arguments as to materiality are not as strong because the prior conviction occurred 16 years before this case, she did not have any additional convictions, and the trial court retained broad discretion to exclude the 1994 conviction as prejudicial pursuant to Evidence Code section 352. (See, e.g., *People v. Feaster* (2002) 102 Cal.App.4th 1084, 1094 [court did not abuse its discretion when it prevented defendant from impeaching a witness with a prior conviction which occurred 12 years before trial, where there was no evidence the witness had committed any offenses since that time].)

More importantly, however, defendant's *Brady* arguments fail because defendant was aware of the essential facts underlying the potential impeachment evidence – that Lynette, his mother, had a prior conviction. Defendant did not advise his attorney about this information until counsel completed closing arguments, and defense counsel did not raise the issue with either the court or the prosecutor until the court advised the parties that the jury had reached a verdict in the case. In defendant's motion for new trial, there is no evidence or declaration that defendant did not know about Lynette's prior conviction until the time of closing arguments, or that he did not realize the potential evidentiary importance of her prior conviction until that time. Once defense counsel brought the matter to the People's attention, the People immediately obtained and produced additional information as to the nature and circumstances of Lynette's prior conviction. Based on the undisputed record in this case, the information about Lynette's prior conviction was fully available to the defendant, and confirmation of that information would have occurred through the exercise of reasonable diligence by either defendant or his defense counsel.

V. Imposition of presentence report fee

Defendant's final issue is that the court improperly imposed a $750 fee for preparation of the presentence report without first determining defendant's ability to pay that fee.

A. Background

The probation report recommended the court impose various fines and fees, including a $750 presentence report fee. At the sentencing hearing, the court stated that it would "assess the pre-sentence report fee of $750 subject to the defendant's ability to pay that," and the fee was listed in the abstract of judgment. Defendant did not object to the imposition of the fee.

B. Analysis

Defendant argues that even though he failed to object to the imposition of the fee, he is not barred from arguing there is insufficient evidence to support the court's order because the court failed to determine his ability to pay.

Section 1203.1b, subdivision (a) permits the sentencing court to order defendant to pay the reasonable costs of the preparation of any presentence probation report. "The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (§ 1203.1b, subd. (a).) If the defendant does not waive his right to a hearing, the probation officer is to refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payment shall be made. (§ 1203.1b, subd. (b).)

In *People v. Valtakis* (2003) 105 Cal.App.4th 1066 (*Valtakis*), the court held that defendant's failure to object to fees imposed pursuant to section 1203.1b waived the error on appeal. *Valtakis* found that the antiwaiver language in the statute did not speak to appellate review and that counsel still needed to preserve claims for appellate review by lodging an appropriate objection. (*Valtakis, supra,* at p. 1075.) *Valtakis* further held that defendant's failure to object at the sentencing hearing to noncompliance with section 1203.1b's statutory procedures constituted a waiver of the claim on appeal, consistent with the general waiver rules discussed in *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*) and *People v. Scott* (1994) 9 Cal.4th 331:

> "[T]o construe the language [in the statute] as abrogating *Welch* and *Scott* ... would work results horribly at odds with the overarching cost conservation policy of the section. 'Statutes should be construed to produce a reasonable result consistent with the legislative purpose. [Citation.] The object to be achieved and the evil to be prevented are prime considerations in determining legislative intent.' [Citation.] If needed to avoid absurd consequences, the intent of an enactment prevails over the letter and the letter will, if possible, be read so as to conform to the spirit of the act. [Citation.] Here the antiwaiver language that helps shield defendants against fees beyond their ability to pay subserves a greater purpose of conserving the public fisc [citations], a purpose that would be sacrificed if we adopted [the defendant's] reading. Criminal defendants often lack the means to pay high recoupment fees, and so the amounts imposed are relatively modest in most of the cases we see. To allow a defendant and his counsel to stand silently by as the court imposes a $250 fee, as here, and then contest this for the first time on an appeal that drains the public fisc of many thousands of dollars in court and appointed counsel costs, would be hideously counterproductive. It would also be completely unnecessary, for the Legislature has provided mechanisms in section 1203.1b for adjusting fees and reevaluating ability to pay *without an appeal* anytime during the probationary period [citation] or the pendency of any judgment [citation]." (*Valtakis, supra,* 105 Cal.App.4th at pp. 1075-1076, italics in original.)

We agree with the reasoning of *Valtakis* that defendant's failure to object at sentencing to the imposition of a fee pursuant to section 1203.1b forfeits his claim on appeal. (See *Welch, supra,* 5 Cal.4th at p. 235.) Moreover, defendant was advised in the

probation officer's report about the recommendation for the presentence report fee. Defendant failed to raise the issue of ability to pay during the sentencing hearing either before or after the trial court made its ruling. If defendant had raised the issue, the court could have made factual findings at the sentencing hearing concerning defendant's ability to pay. There was no reason why defendant could not have raised these same objections to the court's noncompliance with the presentence report fee procedures at the conclusion of sentencing, rather than standing by silently as the court imposed the fees, and then contesting this for the first time on appeal, a practice that the *Valtakis* court described as "hideously counterproductive" and "unnecessary." (*Valtakis, supra*, 105 Cal.App.4th at p. 1076.)

We note that in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), the Sixth District addressed defendant's claims that the trial court erroneously imposed various statutory fees, including a $64 per month probation supervision fee under section 1203.1b, "without determining his ability to pay these fees, and that there [was] insufficient evidence to support any such determination." (*Pacheco, supra*, at p. 1397.) *Pacheco* allowed the defendant to raise these issues on appeal, despite his failure to first object to the absence of an ability to pay determination in the trial court. (*Ibid.*) *Pacheco* reasoned that since the defendant's claims were "based on the insufficiency of the evidence to support the order or judgment. [S]uch claims do not require assertion in the court below to be preserved on appeal. [Citations.]" (*Ibid.*)

We agree with the general proposition in *Pacheco* that sufficiency of the evidence claims are preserved for appeal even in the absence of an objection at the trial level. However, defendant has limited his appellate challenge in this case to the statutory procedures and has not raised a substantial evidence claim. Moreover, we find *Pacheco* distinguishable for several reasons. First, the fees imposed in *Pacheco* were not for the costs of the preparation of the presentence probation report; instead, the fees imposed were a criminal justice administration fee, a probation supervision fee, an attorney's fee,

a court security fee, and a booking fee. (*Pacheco*, *supra*, 187 Cal.App.4th at pp. 1396-1397.) Second, the defendant in *Pacheco* was granted probation while the court here sentenced defendant to state prison. (*Id.* at p. 1396.) Third, some of the fees in *Pacheco* were impermissibly imposed as conditions of the defendant's probation, which made them independently erroneous regardless of whether substantial evidence supported the amounts. (*Id.* at pp. 1402-1404.)

We decline to follow *Pacheco* on the issue as to defendant's failure to object because we believe *Pacheco* is inconsistent with *Valtakis* and the authorities cited in that opinion.[5]

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Wiseman, Acting P.J.

_____
Kane, J.

[5] We note that the People rely on the analysis in *People v. McCullough* (2011) 193 Cal.App.4th 864, which also found that *Pacheco* was wrongly decided. We note that the California Supreme Court has granted review in *McCullough* as to that particular issue, and the opinion cannot be cited as authority. (*People v. McCullough*, review granted June 29, 2011, S192513.)